



# California Fair Political Practices Commission

July 19, 1989

Margaret A. Mathieson  
Office of the City Attorney  
City of San Jose  
151 West Mission Street  
San Jose, CA 95110

Re: Your Request for Informal  
Assistance  
Our Advice File No. I-89-286

Dear Ms. Mathieson:

You have requested our advice under the financial disclosure provisions of the Political Reform Act (the Act).<sup>1/</sup> Since you are seeking general guidance and not questioning the duties of any person under the Act, your request is considered a request for informal assistance pursuant to Regulation 18329(c) (copy enclosed).<sup>2/</sup>

The City Attorney's office has prepared proposed guidelines for use by city personnel to determine if particular consultants should be covered by the consultant disclosure category of your conflict of interest code. You have asked us to review the proposed guidelines and provide comments.

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1/ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations, Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations unless otherwise indicated.

2/ Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c) (3).)

First, we commend the city attorney's office for taking on such a challenging task. We are not aware of any other jurisdiction attempting to condense this very difficult area of the Act into easily understood guidelines.

We do have some comments and suggestions to add to your proposed guidelines.

1. Item A. Section 3b. You have indicated that "significant intervening substantive review" occurs when the consultant's recommendation is only one of several factors of equal weight considered by the department in making its decision. We would point out that instead, an employee of the department must, in fact, substantively review the recommendations and present them to the ultimate decision-maker. (Kaplan Advice Letter, No. A-82-108, copy enclosed.)

2. Item C. What Should be Disclosed? Your parenthetical phrase which suggests the types of interests which may need to be reported should read "... (e.g., sources of income, investments or business positions in business entities, real property)." This correction would more accurately describe the types of financial interests required to be disclosed.

We also suggest that you put in an example just before the "NOTE", which could read:

"For example, a consultant who has the authority to recommend or purchase a computer system should disclose investments and business positions in business entities, and income from sources which manufacture, supply or distribute computer hardware or software.

"Since it is not foreseeable that this consultant could affect real property interests, real property disclosure would not be required."

3. Factors in Determining Material Financial Effect (Attachment B) should be revised or else deleted in its entirety.

The material financial effect factors appear to be based on the Commission's materiality regulations 18702.2, Business Entity Indirectly Involved in the Decision and Regulations 18702.3 and 18702.4, Real Property Interests Indirectly Involved in the decision. These regulations are not the only regulations which determine whether a particular decision will have a material financial effect. These regulations only address materiality on entities and real property which are indirectly affected by the decision.

If an interest in real property, source of income or investment interest is directly involved in the decision, it is not necessary to determine the distance from, or dollar amount of the effect on, the affected interest. A decision is considered to materially affect a business entity if that entity is directly involved in the decision (the business entity initiated the proceeding involving the decision or is the subject of the decision) and the consultant has an investment interest in the entity of \$1,000 (\$10,000 for an investment interest in an entity listed on the New York or American Stock Exchange or on the National Association of Securities Dealers National Market List). (Regulation 18702.1).

If it is reasonably foreseeable that a consultant's decision will affect a particular type of business entity, or a source of income, or real property, disclosure of that type of financial interest would be required. In contrast, the materiality regulations are used to determine an official's need to disqualify from a specific decision where the facts of the decision are known, not for determining appropriate disclosure. Accordingly, we would suggest that Attachment B be deleted, or at least be revised to include a summary of Regulation 18702.1.

#### 4. Disclosure Examples - Attachment A

For the same reasons mentioned above, we would suggest that this attachment be substantially rewritten.

As an alternative to Attachment A, we would suggest that department personnel be given sample language of disclosure categories. Since governmental agencies utilize outside consultant companies for many types of functions and projects, it cover all possible contract situations. The categories listed below would merely provide the framework for developing categories which they then could expand on.

#### SAMPLE DISCLOSURE CATEGORIES

For consultants hired to recommend or advise on the purchase of a particular product:

"All investments and business positions in business entities, and income from sources which manufacture, distribute or supply computer hardware or software." (Or whatever the particular product will be.)

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For consultants participating in recommendations on land use or decisions which may affect real property:

"All interests in real property located within the jurisdiction of the city."

or

"All interests in real property located in, or within 2500 feet of the project area" (If the recommendations are only pertaining to property within a specified project area.)

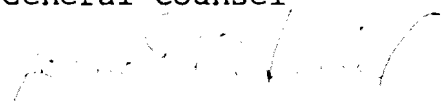
For consultants participating in decisions which may affect only a particular type of business entity, e.g. land developers or contractors:

"All investments and business positions in business entities which are, and income from, land developers, contractors and construction companies." (Or that easily identifiable business type).

I hope this has assisted you. If you have any questions, please feel free to give me a call at (916) 322-5901.

Sincerely,

Kathryn E. Donovan  
General Counsel



By: Jeanette E. Turvill  
Political Reform Consultant  
Legal Division

JET/jt

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**CITY OF SAN JOSÉ, CALIFORNIA**  
**OFFICE OF THE CITY ATTORNEY**

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JOAN R. GALLO  
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May 4, 1989

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Dear Ms. Turville & Ms. Hoff:

As per my conversation with John Wallace of your office, I am sending the enclosed materials to you for your review. The materials include guidelines for use by City employees who will be making disclosure determinations for consultants. Our conflict of interest code requires each department, in conjunction with the City Attorney's Office, to determine appropriate disclosure requirements when preparing a consultant agreement. The outline, Factors in Determining Material Effect, contains factors taken from the materiality regulations (2 Code of Cal. Regs. §§ 18702 - 18702.6).

We request that you review these materials to determine whether they accurately reflect the financial disclosure requirements of the Political Reform Act. Any suggestions you may have on how to translate the Act's consultant disclosure requirements into workable guidelines would also be appreciated.

Sincerely

MARGARET A. MATHIESON  
Research Attorney

MAM:mjw

## GUIDELINES FOR DISCLOSURE DETERMINATION FOR CONSULTANTS

### PURPOSE:

These guidelines are provided to assist in determining:

1. Whether a consultant is required to disclose any economic interest in conjunction with his/her specific consultant engagement with the City or Agency, and
2. What **type** of economic interests, if any, the consultant must disclose.

### CONSIDERATIONS

#### A. Review the Contract

1. What services are provided?
  - a. Define the consultant engagement in terms of the actual services to be provided, i.e., the specific tasks that will be performed, including any recommendations to be made, managing or approving tasks, City or Agency decisions participated in or influenced by the consultant and work products to be provided.
  - b. If the consultant acts essentially as a City or Agency staff member, e.g., the consultant has daily or regular interaction with City or Agency employees, or influences decisions as an employee might do, then disclosure is required to the extent that it would be required of an employee acting in a similar capacity.

2. What degree of City or Agency review?

If the consultant conducts research and arrives at conclusions with respect to the rendition of information, advice, recommendation or counsel **independent** of the control and direction of City or Agency employees, other than normal contract monitoring, then disclosure may be required depending on the consultant's ability to influence City or Agency decisions.

3. Assess the consultant's influence on City or Agency decisions:

- a. Does the consultant possess **authority** with respect to any City or Agency decision beyond the rendition of information, advice, recommendation or counsel?

**Example:** The consultant is hired to determine what software system best suits the needs of the Department and is authorized by the contract to purchase and install the system.

- b. Will the consultant's information, advice, recommendation or counsel be accepted or relied upon by the City or Agency without a **significant intervening substantive review**?

"Significant intervening substantive review" occurs when the consultant's recommendation is only one of several factors of equal weight considered by the Department in making its decision.

**Example:** The type of recommendation the consultant is hired to make is routinely relied upon by the Department in making its decision without consideration of other factors.

- c. Will the consultant recommend one or more **specific** companies, persons or products?

- d. Will the consultant provide any information or recommendations which require the exercise of **judgment** on the part of the consultant and not just the application, by the consultant, of industry or professional standards, regulations, codes or laws?

If no to all questions a through d above, disclosure is not required. If yes to any, disclosure may be required.

B. What Individuals Will Provide the Services?

A consultant contract may be with a firm but disclosure is required only of **natural persons**. Accordingly, it will be necessary to identify individuals who will provide the consultation and **make determinations for each individual**. Such individuals include:

1. Those officers or employees of the firm who provide information or recommendation to the City or Agency, and
2. Any supervisory officer or employee of the firm with the authority to approve, disapprove or modify the information or recommendations before they are given to the City or Agency.

C. What Should be Disclosed?

1. Determine, based on the range of services to be provided by the consultant, **what types of economic interests** (e.g., sources of income, business interests, real property) could be affected by the consultant's services.

**NOTE:** Although disclosure of sources of income is not required in the first disclosure statement, such sources must be disclosed on annual statements, if any, and leaving office statements.



2. Using the attached outline, Factors in Determining Material Effect, determine whether the foreseeable effect of the consultant's services on each of these economic interests could be material.

NOTE: At this step, you do not need to know what economic interests the consultant actually has, just assume for analysis that the consultant does hold each of the interests.

3. Provide, in the consultant's contract, for disclosure of those economic interests which have been identified as capable of being materially affected by the consultant's services.

#### PROCEDURE

- A. Persons in the Administration delegated responsibilities for making disclosure determinations will provide disclosure determinations for review by the City Attorney or General Counsel.
- B. The City Attorney or General Counsel will review all determinations, including review with the FPPC if needed, to arrive at a final City or Agency determination.

ATTACHMENT A  
DISCLOSURE EXAMPLES

1. Consultant hired to advise on the potential uses of a particular piece of property.

a. Ownership of Real Property in the Project Area.

Recommendations regarding the use of a particular piece of property will normally have some effect on the immediate area surrounding the property, i.e., within 300 feet. Ownership of property within 300 feet of the project's boundaries should be disclosed unless the recommendations **cannot have any financial effect** on the surrounding property. (See Factors Guide, p. 2.)

Whether such recommendations will impact a broader geographical area will depend on the City's or Agency's object in seeking outside advice. For example, the impact of the consultant's advice will be limited if the property has already been designated by the City or Agency as recreational area and the only advice being sought is where to place a golf course, picnic area and other facilities. However, the advice will impact a broader geographical area if the City or Agency desires the consultant's advice as to whether or not the property should be purchased and/or developed. The Factors Guide gives specific guidelines on determining what is a material financial effect on property between 300 feet and 2,500 feet and more than 2,500 feet from the subject property. (See Factors Guide, pages 2-3).

**b. Other Economic Interests in the Project Area.**

Land use decisions could also impact business entities, other landowners, and leasehold interests in the vicinity of the subject property. The potential impact of the recommendations made by the consultant should be compared with the guidelines to determine whether any of the following could be affected and therefore should be disclosed:

- 1) Investments or positions held in businesses located or owning land in the project area or income received from such a business.
- 2) Landowners in the area (who may be sources of income to the consultant).
- 3) Leasehold interests in the area (which may be held by the consultant).

**2. Consultant hired to advise on the purchase of a particular product.**

A consultant hired to recommend which product best suits the needs of the City or Agency may be required to disclose sources of income, including business entities and individuals, which are involved in the sale or production of such a product. Any investments or positions held in such businesses may also be reported. Whether an economic interest in a particular type of company (i.e., a Fortune 500 Company, a company listed on the Stock Exchange, etc.) need be reported will depend on the purchase price of the product. For a multi-million dollar purchase, economic interests in all types of companies should be reported. For a smaller purchase, the types of businesses to be disclosed could be appropriately limited. (See Factors Guide, pages 1-2).

## ATTACHMENT B

### FACTORS IN DETERMINING MATERIAL FINANCIAL EFFECT FOR ESTABLISHING LEVEL OF DISCLOSURE IN CONSULTANT CONTRACTS

The City or Agency should list in the disclosure provisions of a consultant's contract only the types of economic interests which could be materially affected by the consultant's recommendations. Therefore, if the consultant's services could possibly have a **material** effect, as determined under the following guidelines, on an economic interest (e.g., a Fortune 500 company, a piece of real property, or an individual source of income), the contract must require disclosure of that interest.

#### 1. Business Entity

##### Effect is Material If:

##### a. Fortune 500 Companies

1. \$1,000,000 Effect on Gross Revenues.\*
2. \$250,000 Effect on Expenses.
3. \$1,000,000 Effect on Assets or Liabilities.

##### b. New York and American Stock Exchange Companies

1. \$250,000 Effect on Gross Revenues.
2. \$100,000 Effect on Expenses.
3. \$250,000 Effect on Assets or Liabilities.

##### c. NASDAQ National Market Companies

1. \$150,000 Effect on Gross Revenues.
2. \$50,000 Effect on Expenses.
3. \$150,000 Effect on Assets or Liabilities.

##### d. Pacific Stock Exchange or Eligible Securities List

1. \$30,000 Effect on Gross Revenues.
2. \$7,500 Effect on Expenses.
3. \$30,000 Effect on Assets or Liabilities.

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\*All effects on gross revenues and expenses are measured over a fiscal year.

- e. Companies not covered by (a) above but which meet the financial standards for listing as a Fortune 500 Company
  - 1. \$250,000 Effect on Gross Revenues.
  - 2. \$100,000 Effect on Expenses.
  - 3. \$250,000 Effect on Assets or Liabilities.
- f. Companies not covered by (a) or (b) above but which meet the financial standards for listing on the New York Stock Exchange
  - 1. \$150,000 Effect on Gross Revenues.
  - 2. \$50,000 Effect on Expenses.
  - 3. \$150,000 Effect on Assets or Liabilities.
- g. Companies not covered by (a) or (b) above but which meet the financial standards for listing on NASDAQ
  - 1. \$30,000 Effect on Gross Revenues.
  - 2. \$7,500 Effect on Expenses.
  - 3. \$30,000 Effect on Assets or Liabilities.
- h. All Other Companies (small, privately held)
  - 1. \$10,000 Effect on Gross Revenues.
  - 2. \$2,500 Effect on Expenses.
  - 3. \$10,000 Effect on Assets or Liabilities.

2. Ownership Interests in Real Property

Recommendations have a material effect on:

- a. Any real property within 300 feet of the subject property, **unless** the recommendations will have no financial effect within a 300-foot radius.
- b. Any real property more than 300 feet and less than 2,500 feet from the subject property **if** the effect of the recommendations will
  - 1. Increase or decrease the **fair market value** by \$10,000 **or**
  - 2. Increase or decrease the **rental value** by \$1,000 in 12-month period.

- c. The recommendations involve construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and any real property will receive new or substantially improved services.
- d. There is no subject property from which to measure and the recommendations will affect any real property in the amounts specified in (b) above.

An effect on any real property **more than 2,500 feet** from the subject property is not material **unless**

- a. There are specific circumstances which show that the recommendations will affect such property in the amounts specified in (b) above; **and**
- b. **Either**
  - 1. Less than 25% of other properties within 2,500 feet of the subject property will be affected in a similar manner; **or**
  - 2. There are less than 10 separately-owned properties within 2,500 feet of the subject property.

**Factors** to determine material effect on property **more than 300 feet** from the subject property or when there is **no subject property** from which to measure distances:

- a. Proximity of the subject property and the magnitude of the proposed project or change in use.
- b. Whether it is reasonably foreseeable that the recommendations will affect the development or income producing potential of the property.
- c. In the case of residential property, whether it is reasonably foreseeable that the recommendations will result in a change to the character of the neighborhood (i.e., effects on traffic, view, privacy, intensity of use, noise, air quality).

3. Leasehold Interest in Real Property

Effect is Material If:

- a. The recommendations will affect the allowable use of leased property;
- b. It is foreseeable that a lessee would change the actual use as a result of the recommendations;
- c. The recommendations will result in a change in use of property which will significantly change the use or enjoyment of any leased property within a 300-foot radius;
- d. The recommendations will increase or decrease the amount of rent by \$250 or 5%, whichever is greater, during any 12-month period; or
- e. The recommendations will result in a change in the termination date of any lease.

4. Non-Profit Entity Source of Income or Gifts

Material Effects on Entities Having the Following Gross Annual Revenues:

- a. \$400,000,000 or more
  - 1. \$1,000,000 Effect on Gross Revenues.
  - 2. \$250,000 Effect on Expenses.
  - 3. \$1,000,000 Effect on Assets or Liabilities.
- b. \$100,000,001 to \$399,999,999
  - 1. \$400,000 Effect on Gross Revenues.
  - 2. \$100,000 Effect on Expenses.
  - 3. \$400,000 Effect on Assets or Liabilities.
- c. \$10,000,001 to \$100,000,000
  - 1. \$200,000 Effect on Gross Revenues.
  - 2. \$50,000 Effect on Expenses.
  - 3. \$200,000 Effect on Assets or Liabilities.
- d. \$1,000,001 to \$10,000,000
  - 1. \$100,000 Effect on Gross Revenues.
  - 2. \$25,000 Effect on Expenses.
  - 3. \$100,000 Effect on Assets or Liabilities.

- e. \$100,001 to \$1,000,000
  - 1. \$50,000 Effect on Gross Revenues.
  - 2. \$12,500 Effect on Expenses.
  - 3. \$50,000 Effect on Assets or Liabilities.
- f. \$100,000 or less
  - 1. \$10,000 Effect on Gross Revenues.
  - 2. \$2,500 Effect on Expenses.
  - 3. \$10,000 Effect on Assets or Liabilities.

5. Individual Source of Income or Gifts

**Effect is Material if:**

- a. \$1,000 Effect on Individual's income, investments or assets (other than real property); or
- b. Effect on Individual's real property is material applying standards for ownership and leasehold interests in real property.

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